SYKT. KEWANGAN MELAYU RAYA BHD.

v.

MALAYAN BANKING BHD.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 302 OF 1982]
22 DECEMBER 1983

LAND LAW: *Charges - Order of sale pursuant to s. 263 National Land Code - Application to set aside - Non compliance of statutory provisions - Notice in respect of "a charge" and not "charges" - Whether irregular - Whether separate notices necessary.*

STATUTORY INTERPRETATION: *Statutory notices - In the singular - Deviation from prescribed form - Whether notices bad in law - Interpretation Act 1967, ss. 4(3), 62.*

The appellant was the registered proprietor of a piece of land in Klang which was charged to the respondent in 1965 and again in 1967 to secure one overdraft account. When the appellant defaulted, the respondent served a statutory notice in Form 16D under s. 254 of the National Land Code and dated 13 November 1980. Another notice in Form 16D dated 28 November 1980 was also served. On the appellant's failure to remedy the breach, foreclosure proceedings were taken and an order dated 3 June 1982 made by the Collector of Land Revenue for the property to be sold by public auction. The appellant applied for the order to be set aside on the ground that the notices were bad in law. The two notices in Form 16D mentioned "charge" and not "charges" and further a separate statutory notice had not been issued for each of the two charges.

Held:

[1] The two notices had complied with Form 16D and were effective and good in law. Words and expressions in the singular include the plural. Further, the two notices had not materially contravened s. 436 or the Tenth Schedule of the National Land Code. A form is not invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead. (s. 4(3) and s. 62 Interpretation Act 1967).

[2] The two notices were not bad in law merely because the two charges were not cited in both notices and by the outstanding sum being lumped together. In the circumstances of the case, the chargor was neither prejudiced nor misled by any defect in the notices and there was nothing unjust in the order of sale granted by the Collector.

[Appeal dismissed.]

Case referred to:
Tan Kai Kok v. Thor Teik Seng [1935] MLJ 91

Legislation referred to:
Interpretation Act 1967, ss. 4(3), 62
Interpretation and General Clauses Ordinance 1948, ss. 2(1), 7
National Land Code Act 56/1965, ss. 62, 241(2), 254, 263, 268(1)(e), 436

For the appellant - P. S. Ranjan; M/s. Ng Ek Teong & Partners
For the respondent - Too Hing Yeap; M/s. Shook Lin & Bok

JUDGMENT

Mohd. Azmi FCJ:

This is an appeal against the decision of Peh Swee Chin J dated 12 November, 1982 in which he dismissed the appellant/chargor's originating motion to set aside the order of the Collector of Land Revenue, Klang made pursuant to s. 263 of the National Land Code that the land held under EMR 7188, Lot 1800, Mukim of Klang, be sold by public auction at a reserved price of one million ringgit for failure to comply with two notices of default in Form 16D to pay the sum of RM2,840,826.94 due to the respondent/chargee under charge presentation No. 31438, Volume XVII, Folio 97 dated 10 April 1965 and No. 34236, Volume XXI, Folio 63 dated 21 September 1967.

The evidence before the learned Judge consisted of an affidavit in support of the motion sworn on 30 July 1982 by Norma bt. Mohd. Noar, a secretary of the appellant and an affidavit in reply sworn on 6 September 1982 by Ng Shang Peng, the manager of the Kuala Lumpur Main Office of the respondent. The facts in both affidavits were never in dispute and they could be stated as follows. The land EMR 7188, Lot 1800 registered in the name of the appellant, was charged to the respondent on 10 April 1965 to secure loan facilities in the sum of RM400,000. On 21 September 1967, a second charge over the same land was created by the appellant to secure a further loan facility in the sum of RM180,000; thus increasing the loan facilities to RM580,000. Both the charges were executed by the appellant in favour of the respondent to secure one overdraft account namely Account No. 3-205. When the appellant defaulted in repaying the overdraft facilities, respondent served a letter of demand on the appellant dated 9 October 1980 demanding repayment of the sum of RM2,374,382.24 due with interest within seven days (see exhibit "MBB1"). The appellant failed to comply with the letter of demand, and the respondent's next step was to serve the appellant with a statutory notice in Form 16D under s. 254 of the National Land Code dated 13 November 1980 demanding the said sum of RM2,374,382.24 as being the balance due at 10 September 1980 and requesting it to remedy the breach within one month (see exhibit "NMN1"). Before the expiry of the remedial period of one month, for reason which was not disclosed in the affidavit of Ng Shang Peng, another notice in Form 16D dated 28 November 1980 (exhibit "NMN2") containing identical demand and identical words and schedule as exhibit "NMN1" served on the appellant. The two identical notices under s. 254 NLC, though dated differently are now reproduced:

NATIONAL LAND CODE

FORM 16D

(SECTION 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To: Syarikat Kewangan Melayu Raya Sdn. Bhd.,
Lot 14.07, 14th Floor, Wisma Stephens,
88, Jalan Raja Chulan, Kuala Lumpur.

Chargor under the Charges described in the schedule below of the land so described.

Whereas you have committed a breach of the provisions of these Charges by failing to make payment on demand the sum of Ringgit 2,374,382.24 being the whole outstanding balance on your account as at September 10th 1980 with interest thereon at the rate of 9% p.a with monthly rests from September 11th 1980 to the date of payment, or any part thereof pursuant to a Notice in writing dated October 9th 1980 and received by you on or about October 9th 1980.

And whereas the breach has continued for a period of at least one (1) month prior to the date of this Notice; we, as Chargee, by virtue of the powers conferred by Section 254 of the National Land Code, hereby require you within the period of one (1) month from the service of this Notice to remedy the breach.

And take notice that if you fail to remedy the breach within that period, we shall apply for an Order of Sale.

Dated this day of 1980.

Malayan Banking Berhad by its Attorney:

Signature (or other from of execution) by or on behalf of Chargee.

Schedule of Land * and Interests					
*Town/ Village/ Mukim	*Lot/ Parcel/ L.O.No.	Description and No. of Title	Share of land (if any)	Registered No. of *lease/sub lease (if any)	Registered No. of Charge (if any)
(1)	(2)	(3)	(4)	(5)	(6)
Mukim of Klang	Lot. 1800	EMR No. 7188	the whole	Nil	Charge presentation No. 31438 Volume XVII Folio 97. Charge Presentation No. 34236 Volume XXI Folio 63.

When the appellant failed to remedy the breach within the time given in the second statutory notice (exhibit "NMN2") the respondent applied to the Collector of Land Revenue for foreclosure under the provisions of Part Sixteen, Chapter 3 of the National Land Code, and after conducting an enquiry, the Collector made the order dated 3 June 1982 for the property to be sold by public auction.

Now, the appellant's application to set aside the Collector's order was not grounded on the fact that the respondent had served him with two identical notices under s. 254 of the Code in November, 1980. On this point, the two notices could have been issued *ex abundanti cautela* so that each charge would have a separate statutory notice, although each notice described the breach as the combined sum due under both the charges. If so, we are of the view that the second notice (exhibit "NMN2") had superseded the first notice (exhibit "NMN1") with the result that if the appellant had remedied the breach within one month of the service of the second notice, no order of sale could have been made by any Collector

since the remedial period had been extended. The grounds of appellant's application before the learned Judge was in fact contained in paragraphs 7 and 8 of the affidavit of Norma bt. Mohd. Noar. Briefly they were:

(i) the heading of the two notices in Form 16D as reproduced above referred to "Notice of Default with respect to a charge" and not with respect to "charges", and whereas two charges and not merely one were shown in the Schedule to both the statutory notices. Consequently, by virtue of s. 436 and the Tenth Schedule to the National Land Code, there was non-compliance with Form 16D and both notices were therefore invalid and bad in law;

(ii) the respondent ought to have issued a separate statutory notice for each of the two charges, and each notice should contain the outstanding sum under each charge. To lump together all the amount due under both charges was bad in law and would render both notices ineffective.

On the first ground, we find the learned Judge has sufficiently dealt with the matter by reference to Item 95 of s. 2(1) of the Interpretation and General Clauses Ordinance 1948 which is the fore-runner of s. 4(3) of the Interpretation Act 1967. Section 4(3) provides, "Words and expressions in the singular include the plural, and words and expressions in the plural include the singular." Further, we also note that with regard to Forms, s. 62 of the Interpretation Act which supersedes s. 7 of the Interpretation and General Clauses Ordinance provides, "Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead." In fact, the last column of the Schedule to From 16D anticipates the possibility of more charges than one to be included in one notice, and this is further fortified by s. 241(2) read with s. 268(1)(e) which empowers the creation over the same property of a second and subsequent charge, and also empowers the Collector to apply the purchase money arising on any sale in the repayment of the subsequent charge. As regards s. 436 NLC relied by Counsel for the appellant, it merely provides that, "the supplementary provisions in the Tenth Schedule shall have effect in relation to the forms in the First Schedule and in relation to the procedure to be followed in Registries and Land Offices." Apart from the fact that Form 16D is one of the many forms provided in the First Schedule to the NLC, we fail to see in what manner the respondent's two notices in Form 16D had materially contravened the additional provisions in the Tenth Schedule. Having regard to the provisions of s. 4(3) and 62 of the Interpretation Act, we find no merit in the argument of Counsel for the appellant that the learned Judge erred in holding that the two notices had complied with Form 16D and were therefore effective and good in law.

On the second ground, it is the appellant's argument both here and the Court below that by citing the two charges in both notices and by lumping together the outstanding sum due under both charges, the appellant/chargor would not know how much was exactly due under each of the two charges. In concluding that the appellant's objection to be purely technical, the learned Judge relied on the judgment in *Tan Kai Kok v. Thor Teik Seng* [1935] MLJ 91. In that case Burton J refused to deal with purely technical objection that the chargee had failed to specify the time to remedy the breach in the notice of default, on the ground that it misled no one and would not avail to set aside an order otherwise good. Before us, it is also argued that the defect is substantial enough to prejudice the appellant to rectify the breach. In our view, whether a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order of sale unjust, and this in

turn must necessarily depend on the circumstances of each particular case. Now, what were the circumstances of the present dispute? Although there were two charges, they related to the same land; the same parties were involved; and the overdraft facilities were kept in one and the same account in respondent's bank. It would appear that the second charge was created in order to secure the increase in the limit of the overdraft facilities from RM400,000 to RM580,000 and as such it must be difficult to apportion as to which sum due was referable to which charge, unless the appellant had requested for separate account in the bank for each charge. As the appellant knew all along that he had only one account with the respondent for the two charges, there was no way how it could have been prejudiced or misled. Merely because the two notices contained both the charges and the amount due from both was combined, it could not be said on balance that the appellant was thereby prejudiced or misled. The breach and non-compliance with the notices had been admitted, and so was the total amount due from both the charges. There was no evidence that the appellant had ever sought information from the respondent how much was due from each charge so as to enable him to make separate repayments. But the fact remained, even after the letter of demand dated 9 October 1980 (exhibit "MBB1") was served, the appellant did not show any intention to rectify the breach, and nor during the remedial period of one month after service of two statutory notices. Further, there was not an iota of evidence that the respondent had at any time tried to mislead or prejudice the appellant. There was therefore nothing unjust in the order of sale being granted by the Collector. In the circumstances of the particular case we find that the appellant's second ground must also fail.

We accordingly dismiss this appeal with costs.

Also found at [1984] 1 CLJ 78